

ALEXANDER Earl of HOME, CHARLES Earl of TANKERVILLE, and William Turnet, Lessee of the Earl of HOME's Fishings in the River Tweed, at Fairburn Mill, - - } Appellants.

JOHN Duke of ROXBURGH, Sir Alexander Don, of Newton, and Sir George Hay Macdougall, of Mackerstown, Baronets, Walter Scott, of Harden, and John Scott, of Gala, Esquires, and others, Proprietors of Fishings in the River Tweed, lying above Fairburn Mill; and Thomas Lillie, Robert Hope, Andrew Shiell, William Mitchell, and William Spence, Lessees of these several Fishings, } Respondents.

The Case of the RESPONDENTS.



THE Respondents, as Owners or Lessees of Fishings in the River Tweed, lying above Fairburn Mill Dam-dike (which, on Account of their Situation in respect of the said Dam-dike, and the Fishings lying below it, are, in the Language of the Law of Scotland, called *Superior Fishings*) had long complained of the illegal Methods of Fishing practiced by the Owners and Lessees of the *Inferior* (or lower situated) Fishings in the said River; and of the unlawful Devices used by them for preventing Salmon from passing up and down the said River. And these Complaints remaining unnoticed and unredressed, the Magistrates, within whose Jurisdictions those Superior Parts of the said River lie, became, therefore, disinclined to enforce the Execution of the Laws against Destroyers of Salmon

in prohibited Time, as that was the only Time in which the *Inferior* Fishers allowed Salmon to pass up to them. Hence Salmon, and Salmon Fry, were killed in forbidden Time without Restraint.

The Owners of the *Inferior* Fishings, and particularly the Corporation of Berwick, who own the most valuable, finding their Interests much hurt by the Remissness of the Scotch Magistrates, and Non-Execution of the Laws for preserving the Breed of Salmon as aforesaid, now became Complainants in their Turn; and the Answer uniformly made to them was, that whenever they should think proper to desist from the Practice of their illegal Methods of preventing the Salmon from passing up the said River, by setting Nets in and across the same, and otherwise, then, and not till then, they might expect to have these Laws executed in the *Superior* Parts of the said River.

One of the Modes of Fishing, complained of by the *Superior* Fishers, was practiced in the Dam-dike of Fairburn Mill, which is the Property of the Earl of Home, in the following Manner. This Dam-dike is erected in, and extends almost quite across the Channel of the River Tweed, about Four Miles below Kelfo, where that River is the Boundary between England and Scotland. The Earl of Home is Owner of Fairburn Mill and Lands, and has a Right of Salmon Fishing on the one Side; and the Earl of Tankerville is Owner of the Lands, and has Right to the Salmon Fishing on the other Side the said River, at this Place. In this Dam-dike there have always been five Openings, Apertures, or Holes, of about two Feet wide each, originally intended for the double Purpose of venting Water unnecessary for the Service of the said Mill, and giving the Fish a free Passage up and down the River.

Though this Dam-dike was, at first, intended for the Use of Fairburn Mill only; and though these Openings were designed and made merely for the Purposes before-mentioned, yet the Lessees of the two noble Earls of Home and Tankerville did lately combine to pervert the said Apertures or Openings to a very illegal Use; and the noble Appellants themselves have appeared in support of that Combination. On the upper Side of each of those Apertures, they have fixed a Pock-net, the Tail of which is stretched up the River and fastened by a Stone, the Mouth of it being downwards, and taking in or including the whole Aperture. On the lower Side there is a square Barricade, or Pinfold of Stones, with an Opening on each Side to allow the Salmon to pass in; in each of these Openings in the Pinfolde are fixed stented or framed-Nets, that fall down within two or three Inches of the Bottom of the River, and the Mouth of them towards the Inside of the Pinfold. When Salmon come up the River they pass easily into the Pinfolde under these Nets, which rise up to give them way; but if they pass through the Apertures in the Dike, they run into the Pock-nets, and if they turn back they are infallibly caught in the Framed-nets.

And as the Pinfolde are of considerable Extent when Salmon happen to rest in them, without going into any of the Nets before described, the Fishermen spread Back-nets of three or four Fathom long each, across the River, a little below the Pinfolde, and, having taken up the framed or stented Nets, they beat the Water in the Pinfolde with Sticks until they drive the Whole of such Salmon into the Back-nets.

These Engines and Devices could not have been so totally destructive of the *Superior* Fishings, if this Dam-dike were not of a very peculiar Construction. Other Dam-dikes are in general low, and sloping down the River; so that not only Salmon can easily pass over, but it usually happens that Travellers ford the Water upon the Top of them. But the Appellants have of late gradually heightened the Dam-dike of Fairburn Mill, and it is now six Feet high, and quite perpendicular on the lower Side, so as no Salmon can possibly pass over it. By these Contrivances they at last came to kill more Salmon in one Day, than they could do formerly in a Month; and the Respondents were thereby proportionally injured.

To remedy this, some of the Respondents instituted an Action against the Earl of Home's Lessee, before the Sheriff of Berwickshire, which was afterwards removed into the Court of Session, and wherein his Lordship and the Earl of Tankerville became Parties with the Defendant.

The

July, and December,
1768.

The Declaration of the Plaintiffs was founded upon the *Scotch* Laws made for regulating Salmon Fishings; particularly an Act of Parliament of *Scotland*, Anno 1696, which orders a constant Slop to be kept in the Mid-stream of Dam-dikes, and prohibits "all Fishing at such Mill Dam-dikes, with Nets stented, or any other Engine whatsoever." The Sheriff, in the first Place, and afterwards the Court of Session, found, that the North End, or Half of the Dam-dike of *Fairburn* Mill, was subject to the Regulations and Prohibition of that Act: But upon a Reclaiming Petition, wherein was agitated a Question concerning the Jurisdiction of the Court over any Part of this Dam-dike, and whether it could be supposed to be an Object of the said Statute, the Court was of Opinion, "That, in the special Circumstances of this Case, the Act of Parliament 1696, does not extend to the Fishing in question." From this Judgement there is now an Appeal to your Lordships, which is ordered to be heard together with this Case, and shall not, therefore, be herein further insisted upon.

The *superior* Fishers, being thus disappointed in their Hopes of Redress from the Court of Session, continued, with increased Diligence, to kill the breeding Salmon and Fry: And the Corporation of *Berwick*, and other Owners of *inferior* Fishings, perceiving that this Practice would at last destroy their own Fishings, resolved to apply for an Act of Parliament to prevent this Abuse, and also to give Satisfaction to the Owners of the *superior* Fishings, by suppressing the illegal Methods used for preventing the free Passage of the Salmon up and down the said River: And an Act was accordingly passed for these Purposes, in the *Eleventh* Year of the Reign of His present Majesty.

Act 11th Geo. 3d.

Clause 4th.

This Act is intituled, "An Act for regulating and improving the Fisheries in the River *Tweed*, and the Rivers and Streams running into the same; and also within the Mouth or Entrance of the said River." Many Regulations are thereby made, for carrying into Execution what is pointed out by the Title, and, *inter alia*, it is enacted, "That from and after the 12th Day of *May*, 1771, if any Person or Persons shall beat the Water, or Place, or set any White Object, or any other Thing whatsoever, in the said River *Tweed*, or in any River, Rivulet, Brook, Stream, Mill-pool, Mill-lead, Sluice, or Cut, which communicates with the said River *Tweed*, or in the Mouth or Entrance of the said River, or in, over, or across, the said River *Tweed*, or any River, Rivulet, Brook, Stream, Mill-pool, Mill-lead, Sluice, or Cut, or in the Mouth or Entrance of the said River *Tweed*, in order to prevent the said Fish from entering the said River *Tweed*, or from going up or down the said River, or any River, Rivulet, Brook, Stream, Mill-pool, Mill-lead, Sluice, or Cut aforesaid; or shall, by any other Ways, or in any other Manner, prevent the said Fish from entering the said River, and going up and down the said Rivers and Waters before described; every Person so offending shall, for every Offence, forfeit any Sum not exceeding Five Pounds, nor less than Ten Shillings."

Clause 8th.

And it is further Enacted, "That the Penalties or Forfeitures for Offences against this Act may be levied and recovered by Distress and Sale of the Offender's Goods and Chattels, upon Proof of the Offence or Offences" — "before any Justice or Justices of the Peace, or Sheriff Depute, within that Part of *Great Britain* called *Scotland*, for the County, Shire, Liberty, or Place, where the Offender or Offenders shall be or reside, either by the Confession of the Party or Parties, or upon the Oath or Oaths of one or more Witnesses or Witnesses," — "by Warrant or Warrants, in due Form of Law, of such Justice or Justices, or Sheriff Depute, in that Part of *Great Britain* called *Scotland*, (all which Warrants such Justice or Justices, or Sheriffs Depute, is and are thereby authorized and required to grant, and to administer such Oath or Oaths) and the Penalties and Forfeitures, which shall be so levied and paid, shall from Time to Time be applied, one Moiety to the Informer or Informers, and the other Moiety to the Poor of the Parish or Place where the Offender or Offenders shall be or reside, and the Overplus remaining (if any) after such Penalties and Forfeitures, and all Charges attending the levying and recovering thereof are deducted, shall on Demand be returned to the Owner or Owners of the Goods and Chattels so distrained; and in case sufficient Distress shall not be found, or such Penalties and Forfeitures shall not be forthwith paid, that then it shall and may be lawful for such Justice or Justices, or Sheriff Depute, and he and they is and are hereby respectively authorized and empowered to commit every such Offender or Offenders to the Common Gaol, or House of Correction, for any Time not exceeding Three Months, nor less than one Month, as the said Justice or Justices, or Sheriff Depute, upon Consideration of the Circumstances, shall think fit."

Clause 10th.

And it is thereby also Enacted, — "That all and every Person and Persons who shall think himself, herself, or themselves, aggrieved by any Judgement of any Sheriff Depute in any of the Cases aforesaid, may appeal to the Lords of Justiciary in the next Circuit Court of the Circuit wherein such County or Shire shall lie, in the Way, Manner, and Form, and under and upon the Limitations and Conditions prescribed by and contained in an Act of Parliament passed in the Twentieth Year of the Reign of His late Majesty, For taking away and abolishing the heretofore Jurisdictions in that Part of *Great Britain* called *Scotland*, and for other Purposes therein mentioned."

The Respondents apprehending it to be the Intendment of this Law, to abolish every Device and Practice whatever, which prevented the free Passage of Fish up and down the River, by inflicting upon the Transgressors Penalties to be recovered in a summary and easy Method in both Parts of the United Kingdoms; and being advised that the Mode of Fishing used at the Dam-dike of *Fairburn* Mill, as herein before described, is clearly within the Purview and Enactment of the Statute, as it intirely prevented the Fish from going up and down the said River of *Tweed*; they directed a Prosecution to be commenced and carried on, before the Sheriff Depute of the County of *Berwick*, against *William Turnet*, one of the Appellants, for recovering the Penalties enacted by the Statute.

Prosecution commenced against *William Turnet*, one of the Appellants.

The Libel or Declaration in this Case founded upon the said Act of the Eleventh of the King, alleged, or counted, that the said *William Turnet* had contravened and transgressed against that Statute, upon the 13th Day of *May*, 1771, and each of the subsequent Days of the same Month, by practising the Mode of Fishing herein before described at and in the said Dam-dike, whereby many Salmon were taken, and great Quantities thereof were prevented from going



going up and down the said River; and concluded for Payment of the Penalty of 5*l.* for each Day's Contravention of the said Statute as aforesaid; and also concluded (improperly, and without the Authority of the Statute) for the Removal and Demolition of the illegal Engines, which obstructed the Passage of the Salmon as aforesaid.

The Sheriff sustained the Action, and allowed the Pursuers (Respondents) to prove their Libel.—And adhered to this Interlocutor.

The Earls of Home and Tankerville having joined the other Appellant in Defending this Prosecution, they removed the Cause to the Court of Session by Bill of Advocation, or Writ of

Certiorari. The Respondents answered to this Bill, that the Advocation was incompetent, as the Statute upon which the Action was founded had given Jurisdiction to the Sheriff, subject only to an Appeal to the Circuit Court of Justiciary.—And the Bill was dismissed by the Ordinary.

The Appellants presented a second Bill of Advocation, grounded upon the Sheriff's having no Jurisdiction, *the Case not being within the Enactments of the Statute.*

Several Proceedings were had before the Ordinary, unnecessary to be here stated, as they related chiefly to the Jurisdiction of the Court, which was afterwards acquiesced in, it appearing for the Interest of both Parties to have the Merits of the Cause fairly tried; the Respondents, therefore, restricted the Conclusion of their Libel to the Penalties for Contravention of the Statute, in the Particulars of placing at the Apertures of the said Dam-dike fixed Pock-nets, framed or stented Nets, and Back-nets, and beating the Water as before described; and, understanding the Suit to be now amicable, they further limited those Penalties to Ten Shillings each, being the lowest Penalty inflicted by the Statute for such Offences. The Advocation was accordingly allowed, and Memorials upon the Merits ordered to be lodged, with which the Ordinary made *Avifandum* to the Court.

The Appellants pleaded,

Memorial for the Appellants.

That the professed Purpose of the Statute was to regulate and improve the Fishings in the said River *Tweed*, but not to deprive any Owner of Fishings which had been immemorially enjoyed. This would be such a glaring Piece of Injustice, as the Law could not intend; for though private Interest must yield to Publick Good, yet when that happens to be the Case, a suitable Recompence and Satisfaction is always given to the private Party.

That the Preamble of the Act corresponds to the Title, and stands thus, "Whereas Salmon, Gilfes, Salmon-Trouts, and Whitlings, and the Spawn or Fry thereof, are frequently killed, taken, and destroyed at improper Seasons in the River *Tweed*, and the Rivers and Streams which run into the same, and also within the Mouth or Entrance of the said River, to the great Detriment of the Owners and Occupiers of the Fisheries, and Loss to the Publick."—And it was material to observe upon this Preamble, that, besides the general Improvement of the Fishings in the said River, the Persons for whose Benefit and Advantage the Regulations thereby made were primarily intended, were the Owners and Occupiers of these Fishings.

That the 4th Clause of the Statute, which the Respondents have founded upon, has no Relation to the Taking or Killing of Salmon; all that was in view by this Clause was, to suppress the Mal-Practices therein enumerated, or others of the like Nature, whereby the Salmon were either deterred or prevented from entering, or from passing up and down the said River.

That by the 7th Clause of this Act, all Persons are prohibited from Fishing, "*within the Mouth or Entrance of the said River Tweed*;" but there follows a Proviso saving the "Right of the Owners or Proprietors of Fisheries, and the Right of any other Person or Persons who then were, or at any Time thereafter should or might be seised, possessed of, or intitled to any Manors, Seigniories, or Royalties *within the Mouth or Entrance of the said River Tweed, as the same was therein before described*." And declaring, "That all and every such Owners and Proprietors, and other Person or Persons as last were mentioned, should have and enjoy all such Right of Fishery, *within the said Mouth or Entrance of the said River Tweed, as they had thitherto lawfully exercised or enjoyed*."—And, that as the Court had found, by the Judgment in the former Process, (meaning the Judgment appealed from to your Lordships by the Respondents in this Case, and which Appeal is ordered to be heard together with this Case, as before mentioned;) that the Appellants Fishing at the said Dam-dike was not subject to any of the statutory Regulations of either Kingdom; consequently, that Mode of Fishing was, at the Time of passing the said Statute of the 11th of the King, lawfully exercised and enjoyed by them; and should, therefore, *although not within the Mouth or Entrance of the said River*, be saved to them by the aforesaid Proviso.

The Respondents pleaded,

Memorial for the Respondents.

That the Mode of Fishing, and Engines therein used by the Appellants at the Dam-dike aforesaid, being contrary to the Laws of both Kingdoms, and preventing intirely the said Fish from going up and down the said River of *Tweed*, fell directly within the Intendment and enacting Words of the said Statute. And, that the permitting the free Passage of Salmon up and down Rivers, being grounded in publick Policy, that the Use thereof, while fresh, may become more general, and in Justice to the Owners of *superior* Fishings who purchase for valuable Considerations, the Statute which was intended for this salutary Purpose, merits the most liberal Construction.

That it ought to be supposed, that the Situation of this Part of the River *Tweed*, in Point of Jurisdiction, and Difficulty of trying any Transgression against the Laws of Fishing, was known to the Legislature at passing the Statute, and that one of the Objects of the Law was to remedy the Defect, by empowering the Magistrates in both Parts of the Kingdom to compel Obedience to the Law, by awarding Penalties against those who transgressed in doing any Thing whatever to prevent the free Course of the Salmon up and down the River, which they were not warranted to do by the Laws of their respective Countries.

And, that the Proviso to the 7th Clause of the Act respects only *legal* Modes of Fishing, is expressly limited to Fishings, *within the Mouth or Entrance of the said River Tweed, as the same is therein before described*, and does not apply to Fishings situated in any other Part of the River.

The Ordinary having reported the Cause to the Court, the following Interlocutor was made.

2d March, 1773. Interlocutor of the Court of Session appealed from.

"Upon Report of Lord Gardenston, (the Ordinary) and having advised the Memorials given in for the Parties, the Lords Repel the Defences proponed for the Defenders, (Appellants) and Remit the Cause to the Sheriff." The

The Appellants have thought proper to appeal to your Lordships from the said Interlocutors of the Sheriff, of Dates the 11th and 25th Days of *July*, and 15th Day of *August*, 1771, the the Interlocutor of the Ordinary upon the Bills of Date the 31st Day of *August*, 1771, and the Interlocutor of the Court of Session dated the 2d Day of *March*, 1773; But the Respondents hope that these Interlocutors will be affirmed, and the Appeal dismissed with Costs, for the following or other

R E A S O N S.

I. The Mode of Fishing complained of, and Engines therein used, are prohibited both by the Laws of *England* and *Scotland*; and as they have the direct Effect of *preventing the Fish from going up and down the River*, they fall within the Intendment and Enactment of the late Statute of the 11th of the King.

II. The Practice of driving the Salmon out of the Pinfolds into the Back-nets, falls within the *ipsissima verba* of the Statute, whereby Persons are prohibited to *beat the Water*, which the Appellants always do when they observe Salmon in the Pinfolds.

Objection. This Part of the River *Tweed* is so rapid that it is impossible to use, successfully, the common Method of Fishing by Net and Coble; and, therefore, the said Dam-dike was built for the Purpose of Fishing, and has been used for that Purpose Time out of Mind.

Answer. The River *Tweed* is not rapid at this Place, except in so far as is occasioned by the said Dam-dike: On the contrary, there is a Passage-Boat goes between the Castle of *Wark* and the North Side of the River, in very deep and slow Water; and in all that Part of this River where the Earls of *Home* and *Tankerville* have Rights of Fishing in the respective Sides adjacent to their respective Lands, which is above two Miles in length, there is only one Ford, and that a very deep one, towards the lower End. The common Method of Fishing used in the River *Tweed*, by Net and Coble, was, and is, as practicable in this as in any other Part of the said River. The said Dam-dike must, therefore, have been erected for the Service of *Fairburn* Mill only. It is proved in the other Cause to be heard along with this, that the whole Fishing belonging to the Respondent the Earl of *Home*, was of inconsiderable Value, and that the Fishing of the Dam-dike was of little or no Value till improved by new Nets and Encroachment; and the Fishing belonging to the Earl of *Tankerville* could not be better, being practiced in the same Manner; and which Manner of Fishing is not only not authorised, but is contrary to the Spirit and Intendment of the Regulations settled by the Laws of both Parts of the Kingdom with regard to Salmon Fishings; and therefore the Mode of Fishing complained of falls clearly within the Intendment of the late Act.

JA. MONTGOMERY.
HENRY DUNDAS.

Die Luna 6: Junij 1774.

*Ordered & adjudged That the Appeal be Dismissed
and that the Interlocut^r therein complained of be
Affirmed.*



To be heard at the Bar of the House of
Lords, (together with another Cause) on *Tuesday*
the 10th Day of *May*, 1774.

The CASE of the RESPONDENTS.

JOHN Duke of ROXBURGH
and others, - - - - - } Respondents.

ALEXANDER Earl of HOME,
and others, - - - - - } Appellants.